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State v. Russo Appellant's Reply Brief Dckt. 41395

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MICHAEL ROWE RUSSO, Defendant-Appellant.	NO. 41395 CANYON COUNTY NO. CR 2009-29933 APPELLANT'S REPLY BRIEF ON REVIEW

STATEMENT OF THE CASE

Nature of the Case

Michael Russo stands convicted of rape and two related felonies, and is currently serving a fixed life sentence. On appeal, Mr. Russo has asserted two claims of error. First, he has argued that the district court erred in failing to suppress a cell phone video discovered through a search of a cell phone found on his person. Second, he has contended that the district court erred in allowing the State to present irrelevant, highly prejudicial evidence concerning his deviant sexual interests.

Mr. Russo's appeal was originally assigned to the Idaho Court of Appeals, which affirmed his convictions. *See generally State v. Russo*, 2013 Opinion No. 15 (Mar. 4, 2013) (*hereinafter* Opinion). With regard to the Fourth Amendment "search" issue, the

Court of Appeals held that, even though officers had a warrant particularly describing the places to be searched as Mr. Russo's residence and his motorcycle, the police were nonetheless free to search—*pursuant to the warrant*—Mr. Russo's person and a phone found on his person, where Mr. Russo was detained outside the residence (and not on his motorcycle). (*See* Opinion, pp.3-6.) With regard to the issue concerning admission of the pornography evidence, the Court of Appeals found no error under Idaho Rule of Evidence 404. (*See* Opinion, pp.7-10.)

Mr. Russo sought, and the Idaho Supreme Court granted, review. In his Appellant's Brief in Support of Petition for Review, Mr. Russo pointed out the flaws in the Court of Appeals' reasoning, as well as reiterated the arguments he had made previously. In response, the State addresses only the Fourth Amendment issue. (It rests on its prior brief as to the Rule 404 issue.) With regard to the Fourth Amendment issue, the State argues narrowly that the search of Mr. Russo's person was within the scope of the warrant authorizing the search of his home because, although it is undisputed that Mr. Russo was outside his home, Mr. Russo has not proved he was outside the curtilage. (The State incorporates by reference its other arguments concerning the Fourth Amendment issue.)

The present reply brief is necessary to address to the sole argument briefed by the State on review. In particular, Mr. Russo wishes to point out the myriad flaws in the State's chain of reasoning which lead it to the conclusion that a search warrant authorizing the search of a single apartment in a multi-unit structure allows officers to search the person (and the effects located on the person) of someone found in a public area outside the apartment in question.

Statement of the Facts and Course of Proceedings

The factual and procedural histories of this case were previously set forth in detail in the original Appellant's Brief as well as the Appellant's Brief in Support of Petition for Review. Accordingly, they should not require any further explication herein.

However, because the State has provided only a limited statement of the facts on review, and has chosen to incorporate by reference "its statement of the facts and course of the proceedings as set forth in its brief on appeal," which contained a number of misleading statements, Mr. Russo refers this Court to the factual clarifications provided in his original reply brief. (*See* App. Reply Br., pp.1-3.)

In addition, in its latest brief, the State has proffered an additional factual assertion that requires clarification. The State cites the district court's observation that the affidavit filed in support of the amended search included an allegation that, at 6:00 a.m., Mr. Russo knocked on his neighbor's door to demand that she remove her clothes from the apartment building's laundry machines so that he could do some laundry.[1] (*See* Respondent's Brief, p.3.) While this assertion is consistent with the district court's summary of the evidence (*see* 1/27/10 Tr., p.72, Ls.13-22), as well as the affidavit from which it was derived (*see* R., p.153), the State neglects to mention that it does not appear to be accurate. In fact, Detective Cain's police report indicates that when she spoke to Mr. Russo's neighbors, they reported that Mr. Russo did not speak with them about the laundry until around 11:00 a.m., at which time he merely informed one of them that her clothes were on top of the dryer because he "didn't want anyone to steal them." (*See* R., pp.142-43 (Det. Cain's report indicating that one female neighbor, who had returned from work around 10:30 a.m., reported speaking to Mr. Russo, and

[1] This was an allegation highlighted by the Court of Appeals as well. (*See* Opinion, p.2.)

directing him to the other female neighbor, around 11:00 a.m., and indicating further that the second female neighbor reported that Mr. Russo knocked on her door to tell "her her clothes were on the dryer and that he didn't want anyone to steal them").) Notably, this is timeline completely consistent with Detective Cain's assertion that around 11:00 a.m., while staking out Mr. Russo's residence, she saw Mr. Russo exit his apartment and disappear for a number of minutes behind his building (in an area later determined to be where the laundry room was located). (R., p.142.)[2]

[2] Although not before the district court at the suppression hearing, the trial testimony of Corporal Brian Lueddeke, with the Meridian Police Department, corroborated Detective Cain's report. Corporal Lueddeke was the first officer dispatched to Mr. Russo's residence on the morning of the J.W.'s rape. (*See* 8/30/10 Tr., p.294, L.6 – p.297, L.8.) He testified that he was dispatched before 6:00 a.m. and watched the residence for an hour until he was relieved, and that during that time he never saw Mr. Russo enter or exit the residence. (Tr., p.294, L.14 – p.297, L.8.) Since the front door was the only way in or out of Mr. Russo's residence (R., p.142), had Mr. Russo been banging on his neighbor's door at 6:00 a.m. demanding that she remove her clothes from the apartment building's laundry facilities, Corporal Lueddeke most likely would have seen him.

ISSUES

1. Did the district court err in failing to suppress the video discovered by police in an unconstitutional search of Mr. Russo's cell phone?

2. Did the district court err in admitting irrelevant, highly prejudicial evidence concerning Mr. Russo's deviant sexual interests?[3]

[3] Because the State has not addressed this issue in its Respondent's Brief on Review, no reply is necessary herein. Rather, just as the State relies upon, and incorporates, its prior arguments on this issue, so too does Mr. Russo.

ARGUMENT

The District Court Erred In Failing To Suppress The Video Discovered In An Unconstitutional Search Of Mr. Russo's Cell Phone

In arguing that Mr. Russo's suppression motion was properly denied by the district court, the State's reply brief on review offers only a single argument—that the original search warrant in this case authorized searches of not just the items specifically described therein (Mr. Russo's residence and motorcycle), but also of the public areas surrounding Mr. Russo's residence and anything or anyone found thereon. (*See* Resp. Br. on Rev., pp.6, 7-10.)[4] In attempting to lead this Court to such a conclusion, the State starts by painting a misleading picture of the facts. In particular, the State largely ignores the fact that the search warrant in this case specifically described the "premises and/or motor vehicle" to be searched as Mr. Russo's "*residence*" and his "motorcycle"; the State focuses almost exclusively upon the warrant's use of the term "premises," as if it had authorized a search of the "premises" at Mr. Russo's home without defining what the term "premises" meant. Next, focusing on the term "premises," as if it had been used in isolation, the State suggests that the term "premises" is vague and ambiguous and, therefore, subject to interpretation. Having contrived this supposed ambiguity, the State then argues that, in interpreting the term "premises," this Court should read that term as broadly as possible; it then proposes a bright-line rule that the term "premises" is necessary coextensive with the legal term of art, "curtilage." Next, the State concludes that because the search in question occurred somewhat near to Mr. Russo's

[4] Although the State has not elaborated on them, the State continues to stand by the additional (alternative) arguments proffered in its original Respondent's Brief. (*See* Resp. Br. on Rev., p.10 n.5.) As those arguments have already been addressed by Mr. Russo, no further discussion as to those arguments is necessary herein. Rather, Mr. Russo simply refers this Court back to the arguments made in his prior briefs.

residence, it must have been within the "curtilage" and, therefore, it must have been on the "premises" so as to fall within the scope of the warrant. Finally, the State assumes that, so long as a person is found within a place for which a search warrant has issued, the warrant necessarily authorizes a search of that person, as well as the personal effects found on that person.

Mr. Russo submits that the State is wrong at each step of its tortured analysis, and that its conclusion, therefore, is likewise incorrect.

First, the search warrant in this case authorized a search of Mr. Russo's residence; it did not simply authorize a search of certain "premises," as the State would have this Court believe. While the warrant made mention of the term "premises," it very clearly and specifically defined those premises to be searched as Mr. Russo's *residence*. Specifically, the warrant stated, in relevant part, as follows:

> These items . . . are located in the following described *premises* and/or motor vehicle, to-wit:
>
> > ***Residence:*** 818 W. 8th Street, Meridian, Ada County, Idaho. The residence sits at the dead end of Northwest 8th Street in Meridian and faces West. The residence is a four-plex with a brown shingle roof. The front of the residence has brick on it. The sides of the house are a pale white wood. The residence has the silver metal numbers 818 affixed to a brown piece of wood on the front of the residence to the left of the door. The residence has a white door. There is a stairwell on the south and east side of the four-plex. The residence of 818 is located on the bottom floor of the four-plex and is on the left side if you are facing the house from Northwest 8th Street.
> >
> > **Motorcycle:** a 1983 Black Harley Davidson Motorcycle. The license plate number is MRE345. The motorcycle is registered to Michael Russo.

> **YOU ARE THEREFORE COMMANDED**, at any time of the day, to make immediate search of the above-described *premises* [sic][5] for the property described above . . . .

(R., p.134 (bold in original; italics added).)

Just as it would with a statute or a contract, this Court should construe the search warrant in this case so as to give meaning to its plain language. *See United States v. Sedaghaty*, 728 F.3d 885, 912 (9th Cir. 2013) (interpreting a search warrant based on the plain meaning of the text contained therein); *cf. Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 528 (2012) ("If the language is plain and unambiguous, interpretation is a matter of law, and this Court will give the contract as a whole its plain meaning."); *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 892-93 (2011) ("The interpretation of a statute 'must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.'"). Here, the search warrant plainly authorized a search of Mr. Russo's residence and motorcycle only, as it specifically defined the "premises" as such. (*See* R., p.134.) The warrant did not authorize a search of the areas *around* the residence, people found *near* the residence, or things discovered in the *vicinity* of the residence. Indeed, if such searches were to be authorized, the

[5] Presumably, the issuing magistrate intended to command a search of "the above-described premises and /or motor vehicle," not just the premises, given that the warrant had just indicated that the items sought were suspected to be in "the following described *premises* and/or motor vehicle."

warrant would have said so.[6] Because the warrant is clear on its face, this Court should adhere to its plain language.

Second, to the extent that this Court is inclined to look beyond the plain language of the search warrant and attempt to divine its scope based on other considerations, it should not accept the State's invitation to adopt a bright-line rule that the term "premises" is always synonymous with "curtilage," such that any warrant containing the word "premises" necessarily authorizes a search of the place described, *as well as* certain surrounding areas. Rather, this Court should define the scope of a given warrant in light of the warrant as a whole.

The State seeks to have this Court expand the scope of the search warrant in this case by focusing myopically on the term "premises." The State suggests that that term has a universally expansive meaning (the State equates it to the "curtilage"), such that any search warrant that includes the term "premises" necessarily authorizes not only a search of the residence on such property, but also a search of the entirety of the

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[6] Notably, when officers discovered a separate structure housing a common laundry facility behind Mr. Russo's apartment building, they went back to the magistrate and obtained an amended search warrant authorizing searches of the phones already found, Mr. Russo's "residence," his motorcycle, and the following additional "premises":

> **Premises:** A detached carport that has attached storage rooms and a laundry room. This structure is separate from the main building. The numbers 818 appear on the doors of the storage rooms. The structure also has the number 8-1-8 on it and they are black and white in color. The laundry room is shared by other occupants and contains a washer and dryer. The structure is directly behind and to the east of the apartment. The structure is wood and is painted brown. The carport is open and has a metal roof.

(R., p.156.) This amended warrant is remarkable for two reasons. First, it makes it exceedingly clear that it is not difficult to particularly describe in a search warrant the areas outside of a residence to be searched, if those areas are also to be searched pursuant to the warrant. Second, it makes it apparent that when the original warrant described the premises to be searched as Mr. Russo's "residence," it truly only meant the residence and not the areas and structures surrounding the residence.

curtilage, as well as anyone or anything found thereon. However, as one of the State's own authorities demonstrate, this one-size-fits-all approach to the term "premises" is misplaced.

In *State v. Sapp*, 110 Idaho 153 (Ct. App. 1986), the search warrant at issue authorized a search of the "premises . . . described as follows," then included a description of the property generally, as well as driving directions to the property (which included a reference to where the "residence" was on that property). *See Sapp*, 110 Idaho at 154. The Court of Appeals held that the term "premises" "does not have one fixed and definite meaning, but rather must be interpreted in light of the context and circumstances in which it is used." *Id.* at 155. Thus, in light of the particular language used in the warrant in that case, the Court held that the "premises" included the "residence" and a greenhouse on the property, but not vehicles on the property. *Id.* at 155-56.[7]

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[7] Of the other cases relied upon by the State for the proposition that any search warrant containing the term "premises" should be interpreted as authorizing a search of the residence and the curtilage, the only one that appears to be of any aid to the State is *Fine v. United States*, 207 F.2d 324, 325 (6th Cir. 1953). The others are either wholly irrelevant or readily distinguishable.

For example, in *United States v. Gottschalk*, 915 F.2d 1459 (10th Cir. 1990), the search warrant at issue "authorized the search of the *entire premises*" for methamphetamine and the implements and ingredients for making methamphetamine, as opposed to simply identifying a residence. *Id.* at 1459-60 (emphasis added). Given the broad parameters of the search area identified in the warrant, it seems infinitely logical that the court there held that the warrant authorized a search of any vehicles within the curtilage of the home. *Id.* at 1461.

Likewise, in *State v. Hagin*, 691 S.E. 2d 429 (N.C. App. 2010), where the issue involved the scope of the defendant's consent (as opposed to the scope of a search warrant), the authorization was for "the personal or real property" at a given address. *Id.* at 562. Given this broad scope, again, it was logical for the court to hold that the search, which included an outbuilding, was within the scope of the consent given. *Id.* at 432-33.

According to *Sapp*, and consistent with common sense, just because the search warrant in this case included the word "premises" at one point, does not mean that that warrant automatically authorized a search of the areas around Mr. Russo's home. The term "premises" must be viewed in context. And, as discussed above, the "premises" were specifically described as Mr. Russo's "residence."

Further, as Mr. Russo has emphasized time and time again throughout this appeal, the United States Supreme Court has already made it abundantly clear that a warrant authorizing a search of a specific "residence" does not automatically authorize a search of someone found outside the residence—even if that person is just barely outside the residence. In *Michigan v. Summers*, where police had a warrant to search the defendant's house, the defendant was detained while descending the steps of his

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State v. Webb, 130 Idaho 462 (1997), is not relevant to the present case. The *Webb* Court simply acknowledged that the United States Supreme Court "has extended the Fourth Amendment's protection of a home against unreasonable searches and seizures to the curtilage" (as distinguished from the home's "open fields"), and upheld the trial court's determination that, under the facts of that case, a barn was not within the home's curtilage. That is not disputed, and it has nothing to do with the scope of the warrant in this case.

Nor is *State v. Pierce*, 137 Idaho 296 (Ct. App. 2002), relevant to this case. *Pierce* involved a relatively straightforward application of *Michigan v. Summers*, 452 U.S. 692 (1981), and held simply that, while executing a search warrant, officers were free to temporarily detain a previously-unknown individual encountered in the driveway, approximately 15-20 feet from the home. *See Pierce*, 137 Idaho at 299-301. The *Pierce* Court did not address the question of whether that individual could be searched based on the warrant. *See id.* at 297, 298 n.1. Further, although the State would have this Court believe that *Pierce* provided a general definition of "premises" which will always include the driveway of the home searched, the reality is that *Pierce* is no more helpful to the State on this point than are *Gottschalk*, *Hagin*, and *Sapp*. In *Pierce*, the search warrant specifically identified the places to be searched as the home, a barn, a stable, and certain vehicles located on the subject property—in other words, the search warrant clearly authorized a search of the entire property, not just the residence. *Pierce*, 137 Idaho 297. In this context, it made sense for the Court of Appeals to use the term "premises" to describe the property generally.

front porch,[8] and the State of Michigan argued that the warrant authorizing the search of the "premises" "implicitly included the authority to search persons on those premises," the Supreme Court, albeit in *dicta*, rejected the State's argument because the defendant was "outside the premises described in the warrant." *Michigan v. Summers*, 452 U.S. 692, 694 (1981). Likewise, in this case, Mr. Russo was undoubtedly outside his residence and, therefore, outside the premises described in the search warrant.

Third, even if the search warrant in this case did authorize a search of the entirety of the "curtilage," the simple fact is that Mr. Russo was not within the curtilage of his home when he was detained and he and his phone were searched. Regarding the curtilage, the United States Supreme Court has explained as follows:

> At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," *Boyd v. United States*, 116 U.S. 616, 630 . . . (1886), and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private.

Oliver v. United States, 466 U.S. 170, 180 (1984). The Court has also provided a four-factored test for determining whether a given area is part of a home's curtilage:

> [C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 300 (1987).

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[8] There can be little doubt that the front porch of a single-family residence will generally be considered part of the curtilage. *See Florida v. Jardines*, __ U.S. __, __, 133 S. Ct. 1409, 1415 (2013)

In light of the definition of "curtilage," which focuses on the intimate activities of a family's private life, as well as the *Dunn* factors, which give meaningful effect to this definition, it should not be surprising that many courts have held that apartment buildings—where residents have little privacy outside their own units—do not have expansive curtilages. *See, e.g., Reeves v. Churchich*, 484 F.3d 1244, 1254-55 & n.19 (10th Cir. 2007) (applying the *Dunn* factors and holding that the front yard adjacent to a duplex, although close to the duplex, was not part of the curtilage; observing that, "Absent contrary facts and findings, the correct presumption would be that an unenclosed yard, used for no particular purpose (but shared with other tenants), adjacent to the street, and in no way shielded from observation or trespass is not curtilage"); *United States v. Soliz*, 129 F.3d 499 (9th Cir. 1997) (affirming trial court's determination that a fenced-in gravel parking area serving a small apartment complex, was not within the curtilage and noting that, "[w]e doubt whether, in the absence of evidence of intimate activities, a shared common area in a multi-unit dwelling compound is sufficiently privacy oriented to constitute curtilage"), *overruled on other grounds by United States v. Johnson*, 265 F.3d 895 (9th Cir. 2001)[9]; *United States v. Brooks*, 645 F.3d 971, 975-76 (8th Cir. 2011) (holding that the backyard of an apartment building, and the stairs leading to basement of that apartment building, were not within the curtilage, because they were common areas for tenants, visible to the public, and were not posted with "no trespassing" signs); *United States v. Sewell*, 942 F.2d 1209, 1212 (7th Cir. 1991) (holding that a hallway outside the defendant's apartment was not part of

[9] The *Soliz* Court had had treated the curtilage determination as a question of fact and, therefore, applied a "clear error" standard of review. *See Soliz*, 129 F.3d at 502. *Johnson* made it clear that the curtilage determination involves a conclusion of law and, therefore, is reviewed *de novo*. *Johnson*, 265 F.3d at 913-15.

the curtilage, as it was open to the public); *Mack v. City of Abilene*, 461 F.3d 547, 554 (5th Cir. 2006) (applying the *Dunn* factors and holding that, although the record did not reveal how far the defendant's vehicle was from his apartment, because it was parked in the open, in a parking lot used jointly by all residents, it was not within the curtilage); *United States v. Pyne*, 175 Fed. Appx. 639, 640-41 (4th Cir. 2006) (applying the *Dunn* factors and holding that a parking garage in a multi-level apartment building was not within the curtilage); *United States v. Acosta*, 965 F.2d 1248, 1254-57 (3d Cir. 1992) (reversing a trial court's determination that a backyard was part of a certain apartment's curtilage, even though tenants of other apartments were without specific authority to use that backyard, in large part, because the landlord still had use of the backyard and maintained the right to grant others access to backyard); *United States v. Miguel*, 340 F.2d 812, 814 (2d Cir. 1965) (holding that lobby of multi-tenanted apartment house was not within the curtilage of any of the individual units); *United States v. Cruz Pagan*, 537 F.2d 554, 557-58 (1st Cir. 1976) (holding that a condominium resident can have no reasonable expectation of privacy in an underground parking area, in part, because it is not within the curtilage because "[i]n a modern urban multifamily apartment house, the area within the 'curtilage' is necessarily much more limited than in the case of a rural dwelling subject to one owner's control," and "[i]n such an apartment house, a tenant's 'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control") (quoting *Commonwealth v. Thomas*, 267 N.E.2d 489, 491 (Mass. 1971)); *People v. Becker*, 533 P.2d 494, 496 (Colo. 1975) (*en banc*) (holding that a common area outside an apartment window is not within the curtilage); *State v. Nguyen*, __ N.W.2d __, 2013 WL 6835011, *4 (N.D. Dec.

26, 2013) (applying the *Dunn* factors and holding that, "unlike the area immediately surrounding a home, a party does not have a legitimate expectation of privacy in the common hallways and shared spaces of an apartment building," and, therefore, those areas are not within the curtilage).[10] *See also Minnesota v. Carter*, 525 U.S. 83, 103-06 (1988) (Breyer, J., concurring) (agreeing with the state court that a grassy common area, used by apartment building residents for walking, playing, and storing bicycles, which was immediately outside a ground-level window of the subject apartment, was not within the curtilage); *California v. Rooney*, 483 U.S. 307, 319 (1987) (White, J., dissenting from dismissal of writ of *certiorari*) (agreeing with state court that a communal trash bin in the basement of an apartment building is not within the curtilage).

Applying the *Dunn* factors in this case, there can little doubt that the apartment building's mailboxes were not within Mr. Russo's curtilage. The suppression hearing evidence is not entirely clear as to how far Mr. Russo had to walk from his front door to get to the apartment building's mailbox area, but it is clear that the mailboxes were outside, such that Mr. Russo had to exit his residence and go outside to reach that area. (*See* R., pp.139, 142.) Apparently, the mailboxes were not contained within any sort of enclosure surrounding only Mr. Russo's apartment (as they apparently served all the residents of his four-plex). (*See* R., p.139 (referencing Mr. Russo going to the "mailboxes").) Certainly, the mailbox area is not a private place where the "intimate activity" of Mr. Russo's home would occur, as it was an area in plain view of curious

[10] As the *Nguyen* Court made clear, the majority rule is that there is no legitimate expectation of privacy in even the *secured* common areas of apartment buildings because, although not generally open to the public, they are shared with other tenants and their guests. *See Nguyen*, 2013 WL 6835011 at *2-3. And, of course, that is to say nothing of the common areas open to the public at large.

eyes (*see* R., p.142 (making it clear that Mr. Russo was observed exiting his residence and heading to the mailbox area while the observing officers were sitting in police cars on the street in front of the apartment building)), and it was in a common area open not only to the other residents of Mr. Russo's building, but also the mail carrier and, presumably the public at large (*see* R., p.139 (referencing the "mailboxes," thereby indicating a common mail area outside the building). Finally, it appears there were no steps taken to shield the mailbox area from public view. Indeed, as noted, it was outside the front of the building where it was readily observable by the public. (R., pp.139, 142.)[11]

Fourth, even if the warrant authorized a search of the entire curtilage, and the mailbox area where Mr. Russo was detained was deemed to be within that curtilage, the mere fact that Mr. Russo was found in the place for which a search warrant exists does not mean that his person was subject to search as well. While the Court of Appeals in this case had little trouble concluding that a search warrant for a residence, even if it does not name the resident, authorizes a search of the resident if he is found therein (*see* Opinion, p.6 n.2), the fact is that this is not such a simple question. If it were, it would not have been reserved for another day by the Supreme Court when it decided *Summers*. *See Michigan v. Summers*, 452 U.S. 692, 695 (1981) ("If that detention was permissible, there is no need to reach the question whether a search warrant for

[11] Although it appears not to have been made part of the record at the suppression heating, Exhibit 25 is a photograph of Mr. Russo's building (*see* Tr., p.351, Ls.3-6), and it shows the precise orientation of the mailbox area *vis-à-vis* the building. (*See* Ex. 25.) That photograph shows that the mailboxes are grouped together—across the front lawn from the building, and fronting the public street. (*See* Ex. 25.) Although the photograph is not entirely clear as to whether there is a sidewalk in front of the mailboxes, it appears that in order for a resident to check his/her mail, that resident would have to be standing either on the sidewalk (if any exists) or in the street. (*See* Ex. 25.)

premises includes the right to search persons found there, because when the police searched respondent, they had probable cause to arrest him and had done so."). Further, in *Ybarra v. Illinois*, 444 U.S. 85 (1979), which preceded *Summers* by a couple of years, the Supreme Court had already made it clear that a warrant authorizing the search of a particular place does not automatically authorize the search of everyone found therein. *Ybarra*, 444 U.S. at 91-92. While the holding *Ybarra* could arguably be limited to situations in which the individual at issue has no specific connection to the place searched, such that there is no particularized suspicion as to that person, *see id.* at 90-92 (discussing the absence of a particularized suspicion regarding the defendant); *Summers*, 452 U.S. at 695 n.4 (discussing *Ybarra* and characterizing part of the holding as follows: "the Court concluded that the search of Ybarra was invalid because the police had no reason to believe he had any special connection with the premises"), and certainly some courts have adopted such an interpretation of *Ybarra* (*see* Opinion, p.10 (Gratton, J., concurring) (citing a Louisiana case for the proposition that the "search of the resident is reasonably and necessarily within the scope of the warrant)), *Ybarra* need not necessarily be given such a narrow reading. It could just as easily be read to stand for the proposition that warrants authorizing the searches of places do not impliedly authorize the searches of people. *See, e.g., United States v. Ward*, 682 F.2d 876, 879-81 (10th Cir. 1982) (holding that a warrant authorizing a search of a man's residence, but not his person, issued based on probable cause that the man had engaged in book-making, did not authorize the search of the person of the man, even though the man was inside the residence when warrant was executed, and it was reasonable to believe that evidence of book-making would be located on his person);

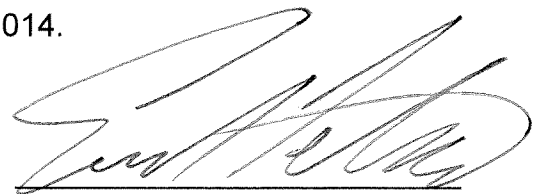
Munz v. Ryan, 752 F. Supp. 1537, 1541-42 (D. Kan. 1990) (holding that a warrant authorizing a search of a woman's residence, but not her person, issued based on probable cause that the woman had stolen certain marked bills, did not authorize the search of the person of the woman, even though the woman was inside the residence when the warrant was executed, and it was reasonable to believe the sought-after bills would be located on her person). Indeed, given the particularity requirement of the Fourth Amendment, and the additional intrusion of having one's person searched, it makes little sense to read *implied* targets into search warrants.

In light of all of the foregoing, Mr. Russo respectfully requests that this Court reject the State's arguments on review, read the search warrant in accordance with its plain language, and hold that where a warrant particularly describes the place to be searched as one specific place, it does not mean that searches are authorized for wherever the evidence sought happens to have been found.

CONCLUSION

For the reasons set forth above, and in his three prior briefs in this appeal, Mr. Russo respectfully requests that this Court reverse the district court's orders denying suppression of the cell phone video and admitting evidence of his sexual fantasies and pornography, that it vacate his convictions and sentences, and that it remand his case for a new trial.

DATED this 7th day of January, 2014.



ERIK R. LEHTINEN
Chief, Appellate Unit

CERTIFICATE OF MAILING

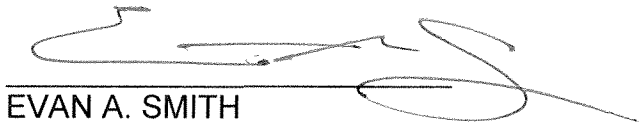
I HEREBY CERTIFY that on this 7th day of January, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF ON REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MICHAEL RUSSO
INMATE #85602
ICC
PO BOX 70010
BOISE ID 83707

GREGORY M CULET
DISTRICT COURT JUDGE
E-MAILED BRIEF

ROB TILLEY
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand deliver to Attorney General's mailbox at Supreme Court



EVAN A. SMITH
Administrative Assistant

ERL/eas